

**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**



In the Matter of:)
)
PROPOSED AMENDMENT)
TO 20.6.2 NMAC (Dairy Rules))

**DIGCE'S PROPOSED STATEMENT OF REASONS AND
CLOSING LEGAL ARGUMENTS**

The Dairy Industry Group for a Clean Environment (hereinafter, "DIGCE") hereby submits its Proposed Statement of Reasons and Closing Legal Arguments as follows. DIGCE incorporates by reference its prior pleadings, witness testimony and exhibits.

I. DIGCE'S CLOSING STATEMENT AND LEGAL ARGUMENT

DIGCE supports the Water Quality Control Commission's (Commission) adoption of rules for the dairy industry in accordance with the Water Quality Act, particularly Section 74-6-4(K) NMSA 1978. In adopting these rules, the Commission must base its decision upon the "best available scientific evidence" as required by Section 74-6-4(K) NMSA 1978 and also must consider proposed rules in light of the criteria in Section 74-6-4(E) NMSA 1978 based upon the evidence presented in the hearing record. Based upon these criteria and the evidence before the Commission, many of the components of the dairy rules as proposed by the New Mexico Environment Department (hereinafter, "Department") should not be adopted, or they should be substantially modified. DIGCE presents below its recommendations for the Commission's adoption of rule provisions and statement of reasons based upon the hearing record.

DIGCE's proposed Statement of Reasons set forth below recommends that the Commission adopt a combination of components of the dairy rules as proposed by the Department and by DIGCE. DIGCE's Statement of Reasons would not adopt the proposals

made by the Coalition. DIGCE's Statement of Reasons recommends adoption of portions of the dairy rule as proposed in the Department's last complete compilation of the proposed rules, its March 29, 2010 "NMED Rebuttal Attachment 2," with some of the changes as contained in the Department's Notice of Proposed Language Changes filed on June 3, changes as proposed in DIGCE Exhibit 8, and some additional changes supported by the hearing record.

The following is a brief summary of DIGCE's positions regarding the key components of the proposed dairy rules, with the details addressed in DIGCE's Statement of Reasons below:

- DIGCE recommends adoption of the definitions proposed by the Department.
- DIGCE recommends that the Commission not adopt the proposed changes to fees, leaving fees to be addressed by the existing discharge permit rules on fees.
- DIGCE recommends that the Commission adopt most of the permit application provisions from the latest Department proposals, with some changes as proposed by DIGCE.
- DIGCE recommends that the Commission not adopt the proposed changes to public notice procedures proposed by the Department and the Coalition, leaving public notice procedures to be addressed by the existing discharge permit rules.
- DIGCE recommends that the Commission adopt the setback provision as proposed by the Department with some changes proposed by DIGCE, and that setback requirements be limited to dairies applying for their first discharge permits as proposed by the Department. DIGCE recommends that the Commission not adopt the changes to the setback provisions as recommended by the Coalition.
- DIGCE recommends that the Commission adopt most of the Department's latest proposal regarding general Engineering and Surveying requirements in proposed section 20.6.2.3117, with several changes as proposed in DIGCE Exhibit 8 and others discussed during the hearing.
- Perhaps the most important element of the proposed rules are the requirements for lining new or improved impoundments. DIGCE proposes that the Commission not adopt the Department's proposal to require double-lined impoundments with leak detection. DIGCE further proposes that the Commission adopt the requirements for single-synthetic lined ponds proposed by the Department, with the changes proposed by DIGCE, along with the requirements for clay liner systems proposed by DIGCE. DIGCE proposes that the decision on whether to use synthetic or clay liners meeting the specifications in the rules be left to engineering judgment, based on testimony

during the hearing, rather than depth to ground water levels, since the hearing record does not support the selection of any particular depth to ground water level as a reasonable dividing line for liner selection.

- DIGCE proposes that the Commission adopt much of the Department's proposal for operational requirements in proposed sections 20.6.2.3220 to 3226, with several changes as proposed in DIGCE Exhibit 8. Several of these changes provide additional flexibility for existing facilities to avoid requirements that replace existing, previously approved pollution control and monitoring measures that are serving their intended purposes.
- Since proposed sections 20.6.2.3220 and 20.6.2.3221 apply to existing dairy facilities and could require substantial retrofitting to replace existing and already permitted pollution control and monitoring measures at the existing facilities, DIGCE's proposed changes to these sections include provisions that would provide more flexibility to retain existing measures that have not been shown to be failing in serving their intended purposes. This point is discussed further below in DIGCE's closing legal argument.
- DIGCE proposes several changes to the ground water monitoring requirements as proposed by the Department in section 20.6.2.3223. In particular, DIGCE proposes that monitoring well locations be left to professional judgment, consistent with the hearing testimony of DIGCE's witnesses. Particularly, the rules should avoid requiring monitoring wells in risky locations and should limit the number of monitoring wells to those necessary for an adequate ground water monitoring system, rather than requiring the use of monitoring wells as leak detection devices for each potential source. DIGCE's proposed language would allow for the use of leak detection methods to be proposed by permittees in lieu of individual monitoring wells for each source, but backed up by an appropriate monitoring well system to measure ground water quality. For land application areas, DIGCE proposes that soil sampling first be used to identify whether there is a potential for ground water pollution from a land application source, with monitoring wells required only if soil sampling indicates a need.
- DIGCE proposes that the Commission adopt most of the monitoring requirements proposed by the Department in section 20.6.2.3224, but not the sulfur/sulfate monitoring requirements and not the proposal allowing for monitoring of additional constituents offered by the Coalition.
- DIGCE proposes that the Commission adopt most of the revised contingency provisions in the Department's latest proposed section 20.6.3227, with some changes as discussed during the hearing.
- DIGCE proposes that the Commission adopt the closure requirements section, 20.6.2.3230, as proposed by the Department with a few changes proposed by DIGCE,

but without the financial assurance and closure planning requirements proposed by the Coalition.

- DIGCE believes that the provisions in proposed section 20.6.2.3220 and several of the following sections will form the heart of the permit conditions to be specified in the rules. Consequently, DIGCE recommends that this section, along with sections 20.6.2.3221, 20.6.2.3222, 20.6.2.3223, 20.6.2.3224, 20.6.2.3225, 20.6.2.3226, 20.6.2.3227, 20.6.2.3229, 20.6.2.3230, 20.6.2.3232, and 20.6.2.3234 be specifically identified in the rules as the permit conditions to be included in permits for dairy facilities where applicable. It is important for the rules to be clear on this point to avoid future disputes over what permit conditions are “additional conditions” subject to the requirements of section 74-6-5.D of the Water Quality Act. This approach is also consistent with Mr. Olson’s testimony on behalf of the Department in favor of moving toward a “permit by rule” approach.

II. DIGCE’S CLOSING LEGAL ARGUMENT

A. The Department Failed to Comply with the Rule Development Process Required by Law

The rule development process conducted by the Department did not follow the letter or the spirit of the requirements of Section 74-6-4(K) NMSA 1978. The failure to follow the rule development process set forth in the statute casts a dark cloud over this entire rulemaking, potentially rendering the outcome invalid. As a result, the Commission should not give the Department the benefit of any doubts regarding its rule proposals and should understand that its proposals were not based upon a true consensus-building process, which the statute intended. Indeed, to avoid concerns regarding compliance with the statutory requirements for rule development, the Commission should consider remanding the proposed rule back to the Department for development of a new proposed rule in compliance with the statute.

In particular, the Department rushed the rule development process. Beginning before the Water Quality Act amendments even became effective, the Department went to the Commission with a proposed schedule for the rulemaking process. Before convening the advisory committee required by the statute or taking any public comment, the Department prepared its own draft of a

dairy rule. That draft also was issued before the amendments to the Water Quality Act became effective. The Department convened a public meeting process, over DIGCE's objections, before the statute was in effect and without providing sufficient time for a reasoned review of the Department's long and detailed draft rule. The Department then immediately began forming an advisory committee, again before the statute was in effect, and convened meetings of that committee with only a few days' notice and virtually no time for committee members to prepare. According to several committee members, the department representatives spent most of the meetings defending the first draft of the rule, rather than listening with an open mind to the advice given by the committee members. The Department did not present scientific analysis or papers supporting the draft rule to the committee members. Importantly, the Department did not even introduce any record of the advisory committee meetings to the Commission so that the Commission could see what advice was given to the Department. It is not even clear whether such a record was made. The advisory committee process ended after less than a month of meetings. Based on the testimony of Senator Harden and the many other Legislators who gave public testimony at the hearing, it is clear that the Legislature did not intend that this process be rushed, but instead that it be done to produce the best possible rule product.

The Department also convened a stakeholder negotiations process. While the contents of these discussions were subject to a confidentiality agreement and evidence of the discussions was not presented to the Commission, based upon the level of disagreement over the contents of the Department's proposed rule during the hearing, the rulemaking development process as a whole failed to produce the desired outcome of agreement on much, if not all, of a proposed rule. Without waiving its arguments that the specific statutory requirements for rule development were not followed and that the Commission should remand the proposed rule back to the Department

for compliance with those provisions, DIGCE provides substantive legal argument and comment on the Department's proposed rule in the event that the Commission decides to adopt a rule at this time.

B. Background of the 2009 Water Quality Act Amendments Directing These Rules

As discussed by DIGCE's witness panel, DIGCE supported the amendments to the Water Quality Act that require the Commission to adopt rules specific to dairies. DIGCE's witnesses, as well as many of the legislators, dairy owners and operators who provided public testimony during the hearing, explained that the rules are needed to put and end an ever-changing set of discharge permit conditions imposed by the Department. Through these permit conditions, the Department has required frequent changes at existing dairies, including expensive relining and replacement of previously approved surface impoundments and installation of new monitoring wells and other monitoring devices to replace previously approved monitoring. DIGCE intends that the new dairy rules will stabilize requirements for compliance with the discharge permit program, thereby avoiding new mandates for changes to operations through permit conditions.

C. The Water Quality Act Provides Flexibility in Prescribing Measures in the Rules

The Water Quality Act, as amended in 2009, eliminated language that prohibited the Commission from specifying the measures required to prevent water pollution and now mandates that it is up to the Commission to specify those measures. The Commission now ". . . shall specify in regulations the measures to be taken to prevent water pollution and to monitor water quality." While the Water Quality Act requires the Commission to specify the "measures," by its plain language it neither directs the Commission to identify only one type of pollution control or monitoring measure that must be used for all dairies nor does it specify the level of detail for the specification of particular measures. For example, it may be appropriate for the Commission to

specify that a backflow prevention device is a required measure, but the Water Quality Act does not require the Commission to specify the particular type of backflow device—the Commission could choose to leave those details to an engineer’s judgment, with a justification required to be presented to the Department. In DIGCE’s view, the level of specificity and prescription proposed by the Department in its rule proposal is not mandated by the Act, but instead is tied to the Department’s own goals related to staffing and resource constraints and, as Mr. Olson put it, moving toward a “permit by rule.” While DIGCE shares the view that a “permit by rule” approach is a laudable goal, DIGCE contends that it is unrealistic to attempt to remove all professional and technical judgment from the rules with respect to designing a dairy facility to prevent ground water pollution.

Indeed, the dairy rules must be flexible enough to allow for consideration of site-specific differences among dairies. This is specifically addressed in the Water Quality Act: “The regulations may include variations in requirements based on site-specific factors, such as depth and distance to ground water and geological and hydrological conditions.” Section 74-6-4(K) NMSA 1978. DIGCE’s proposed changes to the Department’s rule proposal attempt to add some flexibility to the rules while maintaining key elements intended to prevent ground water pollution.

The Department, in its opening statement, argued that its proposed rules identified the right tools to do this job. In many instances, the Department’s proposed rules identify a single type of “measure” required for all dairies, even when several different types of measures have been permitted and are used by existing dairies. If there is sufficient evidence to identify a particular type of pollution control measure as the “best” measure, considering all of the factors specified in the Water Quality Act, Sections 74-6-4(E) and (K), then such an approach may be

appropriate for new dairies, provided there is flexibility to consider site-specific conditions.

Indeed, the Water Quality Act specifically allows such an approach for new facilities:

“Regulations may specify a standard of performance for new sources that reflects the greatest reduction in the concentration of water contaminants that the commission determines to be achievable through application of the best available demonstrated control technology, processes, operating methods or other alternatives, including where practicable a standard permitting no discharge of pollutants.” Section 74-6-4(E) NMSA 1978¹. However, given the variance in site-specific conditions, and the variety of pollution control measures permitted and used at dairies, DIGCE would submit that the Commission should be cautious, and have compelling evidence of the best technology, before it prescribes a single pollution control measures even for new dairies.

D. Existing Facilities Should Be Treated Differently Than New Facilities

It is inappropriate to require existing dairies to replace previously permitted measures in the absence of evidence that those measures are not adequate to prevent water pollution. The rules should acknowledge the investment made by dairies in previously-required pollution control measures that are working and not unduly burden existing dairies with the cost of replacing those effective measures.

Some of the measures specified in the Department’s proposed rules must be implemented at existing dairies only as “contingency” measures under the circumstances described in Section 3227 of the Department’s proposal. While DIGCE has concerns with many of the criteria proposed in the Department’s rule proposal to trigger implementation of a contingency, at least

¹ So far, the Department has not cited or appeared to rely upon this provision, and it has not presented evidence that directly contends that any particular measures in its proposed rules satisfy the requirements of this provision. Nor has the Department explained why this provision does not apply to the pollution control measures proposed by the Department. DIGCE reserves its arguments that this provision is the correct standard to be applied by the Commission to determine whether pollution control measures for new facilities meet the requirements of the Water Quality Act and that the Department has not presented evidence that the measures it has identified in its proposed rules meets this standard.

in these instances, there must be some showing that there is a problem with existing approved pollution control measures. Other measures, however, would have to be implemented at all existing dairies without any showing that existing measures are inadequate. Several examples are addressed in DIGCE's Statement of Reasons. While the Department's proposal allows a few variations in the requirements for use of existing measures, many measures must be implemented at existing dairies regardless of whether existing, permitted measures are working adequately to prevent ground water pollution. For many of the prescriptive measures in this category, the Department did not present evidence that existing permitted measures consistently have failed. The Commission should carefully consider whether the evidence in the record demonstrates that there is a real need to replace existing, permitted measures already installed and operated at existing dairies.

The rules proposed by the Department impose many new unduly burdensome and unjustified requirements on existing dairy operations. While some of these changes may be appropriate for consideration for new dairies that can plan and construct to meet the specific requirements, the Department has not presented sufficient evidence to justify requiring many of these changes for existing dairy operations. Indeed, as discussed during the hearing, imposing these prescriptive requirements that would require retrofitting of existing dairies, without considering whether their existing facilities constructed and operated in accordance with existing permit conditions are adequately protecting ground water quality, may lead to yet another round of Commission proceedings to consider variances.

E. The Premise that Most Dairies Cause Ground Water Contamination is Unsupported by Science or Analysis

The Department has based nearly its entire justification for its rule proposal on the single premise that over half of existing dairies are causing ground water to exceed Commission

standards. Yet, the Department reached this conclusion based upon a primitive and unscientific analysis of ground water data submitted by dairy permittees. Dr. Hagevoort, a respected scientist and dairy expert with New Mexico State University, explained to the Commission why the Department's analysis of the data set does not meet scientific principles. TR 2231-2232, 2235-2237.² In particular, the department reached its conclusions that dairies were the source of ground water contamination measured by their downgradient monitoring wells without doing any reasoned or careful analysis to determine whether supposed upgradient wells were actually upgradient at the time of data comparison, without evaluating other potential sources in the vicinity of the dairies, without considering whether there are historic and unregulated discharges that are sources of contamination, and without undertaking quality assurance/quality control measures regarding either the quality of the data or the Department's own analysis. *Id.* and TR 730-760. Testimony during the hearing identified many other potential sources of contamination in the vicinity of dairies including septic systems, which have been identified by the Department as by far the largest single source of ground water contamination in the state. As Dr. Hagevoort pointed out, the Department itself concluded that of the active dairy permits, only about one-third have a well-determined ground water flow direction, whereas two-thirds were identified by the Department as either unknown or questionable. The Department's witnesses admitted that the Department simply assumed that where a well had been identified as "upgradient" at some point in time, it was upgradient at the time of the water quality measurements in the Department's data set. TR 747. The Department further admitted that it did no independent analysis of whether that assumption was correct, not even a review of ground water level data at the time of the measurements. TR 747-749.

² Specific references to the hearing transcript are indicated in this format, where TR stands for "transcript" and the numbers are the referenced page numbers.

Dairy operators also testified regarding their concerns that monitoring wells placed at locations mandated by the Department could have contributed to contamination. Evidence presented to the Commission showed that, in response to dairy operator concerns, the Department recently changed its monitoring well construction policies to require a more complete seal of the monitor well borehole to prevent potentially contaminated water infiltrating from the surface from flowing down the borehole where it could cause ground water contamination or produce measurements in the well that are more representative of the infiltrating water than of actual ground water. This point also raises serious doubts regarding the Department's reliance on ground water data from older monitoring wells. Importantly, the Department reached its conclusion that a particular dairy was causing an exceedance of ground water quality standards if a measurement from any single well at a dairy facility showed contamination, regardless of ground water quality at other wells.

F. The Commission Should Give Considerable Weight to Evidence on Economic Impacts

The Water Quality Act at Section 74-6-4(E) NMSA 1978 sets forth several factors that the Commission shall consider in promulgating regulations. In addition, the Commission is required to consider the best available scientific information under Section 74-6-4(K) NMSA 1978. The record of these proceedings indicate that DIGCE and public testimony in support of the dairy industry addressed these factors in detail. *See, e.g.*, DIGCE Exhibits 1,2,3,4,5,6, and 8. Meanwhile, DIGCE maintains that the Department, as the proponents of the underlying regulations, failed to meet their burden by giving either minimal facts or no facts in several instances related to these factors. Without reciting the entire administrative record on each point, DIGCE will focus its closing legal argument on one of the important factors, namely, the economics of the proposed regulations.

The Water Quality Act specifically addresses the economics of the regulations at Section 74-6-4(E) NMSA 1978 and requires the Commission to consider: (1) the economic value of the sources of water contaminants, and (2) the economic reasonableness of reducing or eliminating water contaminants from the sources involved. DIGCE maintains that the evidence presented regarding the economics of the regulations should be given considerable weight, especially given the current economic circumstances facing the dairy industry.

Based on available data and public testimony, DIGCE presented clear evidence that dairy industry is facing unprecedented economic and financial difficulties. Simply put, milk prices have been and continue to remain at historic lows, while costs of production continue to increase. On average, a New Mexico dairy is losing about \$2.4 million per year. The culmination of DIGCE's evidence and public testimony clearly demonstrated that the current economic environment is a serious threat to the continued existence of the dairy industry in New Mexico, and it will be a long and slow process of getting the dairy industry back to a point of stability.

Meanwhile, the Department turned a blind eye to these economic realities. The Department presented no meaningful analysis on how its proposed regulations would economically impact the dairy industry, and it gave little, if any, consideration to the economic impacts these regulations would have upon state and local governments who depend on the jobs and taxes generated by the dairies. Instead, the Department's entire economic case hinged on the assumption that the costs imposed by these regulations will always be less than the costs of remediation. In turn, the Department completely failed to give any meaningful analysis or data to support this assumption, especially in light of the fact that no dairies in New Mexico have completed remediation of a particular site.

Without careful consideration of the underlying economic factors set forth in the Water Quality Act, DIGCE maintains that the Department's proposed regulations will be the demise of the dairy industry in the state. *See* DIGCE Exhibit 1. DIGCE further maintains and the public testimony supports a conclusion that many of the existing dairies will be forced to shut down if NMED's proposal is adopted, thereby depriving the state and local communities a valuable economic engine. *See id.*

G. Public Testimony

There was a great deal of public testimony presented at the hearing from dairy owners and operators, owners of businesses who support the dairy industry, citizens, and even many legislators concerned with the outcome of the dairy rules. These citizens took a great deal of time out of their busy schedules and traveled many miles to Santa Fe to express their views on these important rules. The Commission should carefully consider the public testimony provided in this case and, while it may not have been technical testimony, it was heartfelt and came from those who will be most affected by the Commission's decision.

Several members of the New Mexico Legislature provided public testimony to the Commission. In summary, they:

- Provided important insight into the background of Senate Bill 206 and the Legislature's intent from the primary sponsor of the bill (TR 153-161);
- Discussed the importance of dairies and the contributions of their owners and operators to local communities (TR 1346-1348);
- Asked that the rules be fair and equitable (TR 12, 14, 18, 446-447);
- Emphasized the economic importance of the dairy industry to New Mexico with respect to providing jobs, supporting related industries, and supporting the state's tax base (TR 13, 17, 18, 25);

- Expressed concerns with the economic impact of the rules on the dairy industry and potential damage to the industry and the jobs and taxes it supplies to the state (TR 13, 16, 22-25, 1595-1599);
- Expressed concerns that the dairy rules could result in dairies moving to neighboring states (TR 20-21);
- Emphasized that the dairy rules must be based on sound science (TR 20, 32, 446-449);
- Expressed concerns that the Department did not adequately consider advice from industry experts (TR 20-21, 28);
- Expressed concerns with the public meetings held by the Department (TR 16);
- Stated that the rules need to be predictable and stable (TR 447); and
- Noted that other states are actively recruiting dairies for economic development (TR 156).

Numerous dairy owners and operators gave public testimony expressing general concerns with the dairy rules. Their testimonies included the following general points:

- Dairy owners and operators desire to protect groundwater because they depend upon it to supply their water, including drinking water for dairy families and their animals, water for dairy operations, and water for crops (TR 50, 54, 66-67, 68, 77, 80-81, 99, 114, 137);
- The dairy rules need to be based on sound science (TR 50, 52, 54, 69-70, 71, 113, 118, 123-124);
- Imposing regulations without adequate scientific study can cause undue economic consequences, including driving existing dairies away (TR 69-70, 71).
- There are specific examples of undue impacts of rules based in inadequate science (TR 403-404);
- Dairies create many jobs and provide valuable products for the public (TR 51, 176-177, 179);
- The rule development process was premature and rushed (TR 138-140, 177);
- Dairies are owned and operated by families (TR 51);
- Dairy owners and operators want clear, consistent rules (TR 52, 114, 444);

- Dairy rules are needed to limit the frequent changes in requirements that have occurred over time under the existing rules (TR 111-112, 122);
- Dairies contribute to federal, state and local taxes and are vital to state and local economies, and schools (TR 53, 54, 98, 117, 118);
- Groundwater in the vicinity of dairies is impacted by septic systems and the state has not pursued contamination caused by those systems (TR 53);
- Dairy operators cannot control milk pricing and cannot pass additional environmental costs on to their customers (TR 72-73, 164);
- Dairy operations have been permitted by the Department for many years and must share the blame if there is contamination from dairies (TR 99-100);
- It is unfair to change the rules in the middle of the game for existing operations (TR 99);
- Changes required for existing operations seriously disrupt operations (TR 122, 124-125);
- Use of dairy effluent for fertilizer is a form of recycling and reduces the need for commercial fertilizer (TR 100);
- Dairy operators are the real environmentalists because they are stewards of the land and water resources they depend upon (TR 80-81);
- Dairies recycle water (TR 125-126);
- Capital required for compliance with the dairy rules, such as new liner requirements, prevents the use of that capital for other beneficial projects, such as alternative energy (TR 127);
- Dairy permittees take and pay for their own tests and self-report on their operations (TR 92);
- Requirements imposed by the environment department are costly and have prevented improvements that would benefit the environment due to the high costs (TR 93-97);
- The dairy industry is suffering under adverse economic conditions, and regulations will impose additional cost burdens (TR 94, 101, 114);
- Clay liners are accepted in other dairy producing states (TR 101-102);

- Discharge permit requirements have changed several times, including manure lined lagoons in the 1980s, clay lined lagoons in the 1990s, synthetic liners in the 2000s, and now proposed double-liner requirements (TR 111-112);
- Monitoring wells have the potential to, and in several instances have, contributed to ground water contamination, particularly when wells are required to be placed too close to potential contaminant sources (TR 54-60, 121-122, 135-136, 173, 1796-1798);
- Existing wells, such as irrigation wells, should be tested instead of requiring monitoring wells (TR 66-67);
- The Department has required monitoring wells in risky locations against the advice of permittees and their consultants (TR 169-170);
- Flow meters become damaged when used in dairy applications and metering is costly (TR 438-439);
- Flexibility in regulatory requirements is critical to allow a dairy operator to properly manage farming operations and crops in response to changing economic and environmental conditions. (TR 1385-1389);
- Organic dairies are subject to strict requirements and may need special consideration to avoid conflicts between the dairy rules and the organic dairy requirements (TR 106-109);
- There have been delays in permitting due to the Department's commitment of resources to the dairy rule process (TR 1794-1796); and
- Many dairies prepare very detailed, extensive plans and records for nutrient management and need flexibility in the nutrient management requirements to maintain these programs (TR 2155-2160).

Additional public testimony was provided by business owners, professionals, and citizens whose businesses depend on the dairy industry. These citizens emphasized the importance of the dairy industry to their communities and their own businesses and expressed their concerns with new rules that could unduly impact dairies and effect their local economies. The Commission also received testimony from local government officials and formal resolutions from local governments expressing concerns with adverse economic impacts, including significant loss of

jobs, if the Commission adopts the dairy rules as proposed by the Department. Some specific points made by some of these witnesses are summarized as follows:

- An insurance agent testified regarding several insurance claims filed by dairy operators regarding damage to liners, which were self-reported by the operators (TR 62-64);
- The president and CEO of a dairy transport company testified that the dairy industry supports his business with 464 employees and dairies have a major impact not only on payrolls but purchases of equipment and supplies (TR 86-87);
- A businessman testified regarding the importance of the dairy industry to the local economy and jobs created in other industries (TR 104-105, 182-183);
- The New Mexico dairy industry supports one of the largest cheese factories in the world, which significantly benefits the New Mexico economy (TR 401-402);
- The president and CEO of Farm Credit of New Mexico testified that the growing dairy industry has stabilized land values, increased tax revenues in excess of \$80 million, and has a \$1.9 billion impact on New Mexico's economy and accounts for over 14,000 jobs, and 2009 was the worst year ever for dairies, and losses have continued into 2010 (TR 131-131);
- Requiring existing dairies to redo their systems increases the dairy expense and debt levels and they may have trouble financing these projects, and the financial impacts of each of the rule requirements needs to be considered (TR 133);
- A representative of the New Mexico Crop Production Association testified that they oppose the draft dairy regulations because they would impose undue burdens, are not based on sound science, and would drive business out of the state (TR 79-81);
- A local economic development director discussed innovative, green initiatives by the dairy industry and related industries and emphasized the importance of dairies to local economic development (TR 1358-1368); and
- A representative of the New Mexico Farm and Livestock Bureau emphasized the importance of the agricultural industry to the state economy and the contributions of the industry to taxes (TR 2559-2563).

III. DIGCE'S RECOMMENDED STATEMENT OF REASONS

DIGCE recommends that the Commission adopt the following statement of reasons as its basis for adoption of ground water discharge permit rules specific to the dairy industry and for

rejection of components of those rules proposed by various parties.

1. On December 22, 2009, the Commission received a Petition from the Environment Department (Department) proposing the adoption of Supplemental Permitting Requirements for Dairy Facilities.

2. On December 23, 2009, the Commission set a public hearing on the Department's Petition. Notice of the public hearing was published in accordance with 20.1.3.200(C) NMAC.

3. Mr. Steve Glass was appointed hearing officer by the Commission. Mr. Glass issued a Scheduling Order dated January 15, 2010, and amended on March 25, 2010, governing the hearing process.

4. Three parties, or groups of parties, filed Notices of Intent to Present Technical Testimony as well as prefiled direct and rebuttal testimony and exhibits in accordance with the Scheduling Order: the Department, the Dairy Industry Group for a Clean Environment (DIGCE) and the Environmental Coalition (Coalition).

5. The Commission convened a public hearing on the proposed dairy rules in Santa Fe, New Mexico beginning on April 13, 2010 and continuing on April 14, 15 and 16 and June 8, 9, 10, 11, 14, 15, 16 and 17, 2010. Each of the parties was given a reasonable opportunity to present additional testimony and exhibits in accordance with the Water Quality Act and to cross-examine witnesses who testified at the hearing. Specified times were set aside each day of the hearing to receive public testimony comprised of non-technical testimony, and numerous public witnesses testified.

6. Each witness who testified at the hearing was properly sworn in, and the hearing was recorded by a certified court reporter who prepared a written transcript of the proceedings.

7. Following the public hearing, each party was allowed to present written closing legal arguments and a proposed statement of reasons in accordance with the Scheduling Order.

8. Reserved for Discussion of Commission deliberation process.

9. The Commission hereby adopts Supplemental Permitting Requirements for Dairy Facilities as required by the Water Quality Act, Section 74-6-4(K) NMSA 1978, as set forth in the following statement of reasons. These rules specify the measures to be taken to prevent water pollution and to monitor water quality at dairies under the Water Quality Act.

10. The Commission adopts the Statement of Purpose for the rules as proposed by the Department as section 20.6.2.3201 in NMED Rebuttal Attachment 2 dated March 29, 2010. There were no objections to or comments made on this section during the hearing.

11. The Commission adopts the Definitions for the rules as proposed by the Department as section 20.6.2.3202 in NMED Rebuttal Attachment 2 dated March 29, 2010. The definitions of “dairy facility,” “discharge volume,” “freeboard,” “maximum daily discharge volume” and “stormwater” as proposed in that document were revised to address comments made by DIGCE in DIGCE Exhibit 8, and the additional definitions. The definition of “date of postal notice” addresses concerns expressed in the testimony regarding the use of the date sent by the Department in the event of delays in delivery and the Department’s concerns regarding notices delivered but not accepted. The definition of “excessive nitrogen accumulation” as proposed by DIGCE is unnecessary based upon changes to other rule language proposed by the Department and adopted by the Commission below. DIGCE’s proposed changes to “existing dairy facility” and “existing impoundment” are not needed based upon the clarifications made in the Department’s testimony in response to DIGCE’s cross-examination. DIGCE’s proposed change to the definition of “impoundment” are not accepted based upon the testimony of the Department

that structures, such as tanks and sumps, are not included in the definition because they are not used for “storage or disposal” of wastewater or stormwater. There were no objections during the hearing to the rest of the definitions as proposed by the Department.

12. The Commission adopts the Requirements for Discharging from Dairy Facilities for the rules as proposed by the Department as Section 20.6.2.3203 in NMED Rebuttal Attachment 2 dated March 29, 2010. The changes made in that version and NMED’s rebuttal testimony address DIGCE’s comments in DIGCE Exhibit 8.

13. The Commission declines to adopt the Fees section of the rules as proposed by the Department as Section 20.6.2.3204 in NMED Rebuttal Attachment 2 dated March 29, 2010 for the reasons stated in the direct testimony of DIGCE regarding this section, particularly DIGCE Exhibit 8. The Commission is not required to adopt separate fee rules for dairies because fees are not a measure to prevent ground water contamination or a monitoring measure. The Commission does not find any significant difference in dairy facilities versus other facilities that would justify different fee rules, particularly rules that require payment of half of the application fee before permit approval, which is contrary to the existing fee rule. The Commission does not agree with the Department’s justification for annual fees and believes that the cost of collecting annual fees may outweigh the benefits of spreading fees over the life of the permit.

14. The Commission adopts the General Application Requirements for All Dairy Facilities as proposed by the Department as Section 20.6.2.3205 filed with the Department’s Notice of Proposed Language Changes filed on June 3, 2010. This draft addresses DIGCE’s testimony requesting an opportunity for a pre-application meeting. DIGCE’s comments in DIGCE Exhibit 8 requested a shorter period of 180 days prior to expiration to submit an application, but during the hearing, DIGCE agreed that the one year requirement was necessary to

satisfy public notice and opportunity for hearing requirements. The June 3 version, Subsection D, addresses DIGCE's request for clarification that the contents of the discharge permit application form must be based upon the contents of the rule, and although the Department's proposal does not provide for publication and comment of a draft form as requested by DIGCE, the Department indicated in its testimony that if comments are made on a required form that are not addressed, the form can be taken before the Commission for review (TR 772-772). The Commission encourages the Department to provide draft forms for informal public review and comment. Subsection G of the June 3 version addresses DIGCE's concern that if professional certifications are required, then the Department should accept as complete forms certified by the appropriate professionals. The intent of this provision is addressed in the Department's testimony in response to cross-examination by DIGCE's counsel. The June 3 proposal also extends the time to correct deficiencies in an application, as requested by DIGCE. While the June 3 version does not include language requested by DIGCE in subsection H to clarify that the Department has the burden of proof regarding additional permit conditions not specified in the rules, the Commission finds that the statute, Section 74-6-5(D) NMSA 1978, adequately describes the Department's burden of proof.

15. The Commission adopts the Application Requirements for New Discharge Permits for the rules as proposed by the Department as Section 20.6.2.3206 in NMED Rebuttal Attachment 2 dated March 29, 2010 with changes as described in this paragraph. Subsections A through E are adopted as presented in NMED Rebuttal Attachment 2, as changes were made to address DIGCE's comments. The Commission adopts Subsection F as this subsection merely requires as part of the application information that is required by the existing rules, 20.6.2.3108 NMAC. Subsection G must be modified to reflect changes to the referenced section,

20.6.2.3220.Z, as this subsection is changed in the Department's June 3, 2010 submittal such that an on-site test boring is not always required. Consequently, Subsection G is adopted as modified by striking "from the on-site test boring pursuant to Subsection Z of 20.6.2.3220 NMAC" and inserting in its place "from an on-site boring or well in or near the production area." Based upon the rebuttal testimony of the Department, Subsection H is adopted as proposed by the Department on March 29. Subsection I is adopted except that neither sulfate nor total sulfur are required, as there is no ground water quality standard for total sulfur and the Department did not present evidence of available data from which to estimate total sulfur concentrations. Subsection J is adopted as proposed by the Department in the absence of comments or objections. Subsection K is adopted with the changes proposed in DIGCE Exhibit 8, for the reasons discussed below with regard to proposed Section 20.6.2.3220. Subsection L is adopted with the following change to conform to the revisions to Section 20.6.2.3220.Z: in paragraph (1) after "boring" insert "or wells referenced." Subsections M through Q are adopted as proposed by the Department in the absence of comments or objections. Subsection R is adopted with the changes in DIGCE Exhibit 8 for the reasons discussed in that document and for consistency with Section 20.6.2.3220 as adopted below.

16. The Commission adopts the Application Requirements for Discharge Permit Renewal of Modification for the rules as proposed by the Department as Section 20.6.2.3207 in NMED Rebuttal Attachment 2 dated March 29, 2010 with the changes discussed in this paragraph. Subsections A through D are adopted as presented in NMED Rebuttal Attachment 2, as changes were made to address DIGCE's comments. The Commission adopts subsection E as this subsection merely requires as part of the application information that is required by the existing rules, 20.6.2.3108 NMAC. Subsection F as proposed by the Department is adopted in the

absence of comments or objections. Based upon the rebuttal testimony of the Department, subsection G is adopted as proposed by the Department on March 29. Subsection H is adopted in the absence of comments or objections. Subsection I is adopted with the changes proposed in DIGCE Exhibit 8, for the reasons discussed below with regard to proposed Section 20.6.2.3220. Subsection J is adopted with the following change to conform to the revisions to section 20.6.2.3220.Z: in paragraph (1) after “boring” insert “or wells referenced.” Subsections K through O are adopted as proposed by the Department in the absence of comments or objections. Subsection P is adopted with the changes in DIGCE Exhibit 8 for the reasons discussed in that document and for consistency with other sections on flow meters as adopted below.

17. The Commission adopts the Application Requirements for a Discharge Permit for Closure for the rules as proposed by the Department in Section 20.6.2.3208 in NMED Rebuttal Attachment 2 dated March 29, 2010 as there were no comments on or objections to this section.

18. The Commission does not adopt the Additional Public Notice Requirements for Applications for New Discharge Permits for the reasons given in DIGCE’s pre-filed direct testimony, DIGCE Exhibit 8. The Commission is not required to adopt additional public notice requirements for dairies because they are not a measure to prevent ground water contamination or a monitoring measure. The Commission is not convinced, based on the evidence presented at the hearing, that there are differences in dairy operations compared with other discharging facilities that justify a different set of public notice requirements than those in the existing rules, 20.6.2.3108 NMAC.

19. The Commission does not adopt the Procedures for Requesting Public Hearings on Permitting Actions for Dairy Facilities set forth in the Department’s proposed Section 20.6.2.3215 for the reasons given in DIGCE’s pre-filed direct testimony, DIGCE Exhibit 8. The

Commission is not required to adopt additional procedures FOR dairies because they are not a measure to prevent ground water contamination or a monitoring measure. The Commission is not convinced, based on the evidence presented at the hearing, that there are differences in dairy operations compared with other discharging facilities that justify a different set of procedures for requests for public hearing as presented in subsection A of Section 20.6.2.3215 from those in the existing rules, 20.6.2.3108 NMAC. The Commission would entertain a proposal to modify the existing rules consistent with subsection A. With respect to Subsection B, the rules are not sufficiently clear on what permit conditions are specified in the rules to require denial of a request for hearing. The Commission will leave it to the discretion of the Secretary to determine on a case-by-case basis whether a hearing is warranted, as is the case under the existing rules.

20. The Commission adopts the Setback Requirements for Dairy Facilities Applying for New Discharge Permits for the rules as proposed by the Department as Section 20.6.2.3216 in NMED Rebuttal Attachment 2 dated March 29, 2010, with changes as discussed in this paragraph. The Commission does not adopt the changes proposed by the Coalition for the reasons stated in the Department's and DIGCE's rebuttal testimony, particularly that it is not fair to retroactively impose setback conditions on existing facilities that already have obtained permits and invested in plans, designs, land, and other components of a dairy. The Commission does not accept the change to subsection A as proposed in DIGCE Exhibit 8 based upon the Mr. Olson's testimony at TR 822-824 that the Department believes it is unfair to apply setback requirements to dairies that have been permitted, but not yet constructed. The Commission adopts Subsections B, C and D as proposed in NMED Rebuttal Attachment 2, except that the Commission accepts the change to paragraph (2) in DIGCE Exhibit 8 for the reasons stated in DIGCE Exhibit 8. The Commission adopts Subsection E with the changes proposed in DIGCE Exhibit 8 to paragraph (1),

subparagraph (a) for the reasons stated in that Exhibit, and the Commission adopts Subsection F as proposed in DIGCE Exhibit 8 for the reasons stated in that Exhibit.

21. The Commission adopts the Engineering and Surveying Requirements for All Dairy Facilities as proposed by the Department as Section 20.6.2.3217, Subsections A, B and C filed with the Department's Notice of Proposed Language Changes dated June 3, 2010 except for the changes described in this paragraph. DIGCE's proposed changes to subsection A are not accepted for the reasons described in the Department's rebuttal testimony and the testimony of Mr. Olson regarding how the Department will handle properly certified plans as part of the permit application review process. Subsection B as proposed by the Department is adopted in the absence of any comments or objections. With regard to Subsection C, there were no comments on or objections to paragraphs (1), (3), (4) or (5). The Department accepted DIGCE's change to subparagraph (2)(a), and the Commission does not accept the Coalition's proposed changes to that paragraph for the reasons stated in the Department's rebuttal testimony. The Department made substantial changes to paragraph (6) based upon cross-examination by DIGCE's counsel on that paragraph. The Commission adopts paragraph (7) with the addition of "or volume measurement device" as proposed in DIGCE Exhibit 8, but without the additional sentence proposed by DIGCE, as that issue is addressed by the Department's changes with the June 3 document.

22. The Commission adopts Subsection D of proposed Section 20.6.2.3217 as proposed with the Department's Notice of Proposed Language Changes filed on June 3, 2010 with the following changes. The changes to paragraphs (1), (2) and (3) of Subsection D in the Department's June 3 proposal are supported by Mr. Olson's testimony. TR 856-868. The changes to paragraphs (4) and (5) are supported by Mr. Olson's and Mr. Thomas's testimony. TR 604-632. In paragraph (4), subparagraph (c), "95 percent" is changed to "90 percent" based on the hearing

testimony, wherein the Department's engineer recommended 90 percent. TR 1005 to 1007 and 1053. Instead of paragraph (6) regarding impoundment liners as proposed in the Department's June 3 proposed language, the Commission adopts paragraph (6) in DIGCE Exhibit 8 with the following changes. In subparagraph (a), the language "Where the vertical distance between the seasonal high ground water level and the finished grade of the floor of the impoundment is less than or equal to 100 feet as documented through the most recent ground water data obtained from an on-site test boring(s) or monitoring well(s)" shall be struck and replaced with: "If a synthetic liner is selected." The effect of these changes is to eliminate the Department's proposal to require double-synthetic liner systems, to allow construction of new wastewater impoundments with clay liners, and to eliminate depth to ground water as a basis for selection of a synthetic liner. The Commission's decision not to require double-liner systems and not to base liner system requirements is based on several lines of evidence, including: (1) a lack of a demonstrated relationship between depth to ground water and the percentage of dairies with ground water contamination so that the Commission is without sufficient evidence to establish any relationship between depth the ground water and the necessary liner type; (2) the lack of evidence from the Department regarding whether existing ground water contamination in the vicinity of dairy impoundments is attributable to dairy impoundments versus other sources and the lack of scientific analysis behind the Department's contention that more than half of dairies have caused ground water contamination; (3) the Department's inability to determine any difference in failure rates between historic unlined (or manure-lined) impoundments, clay-lined impoundments, and synthetic-lined impoundments (TR 1073-1083); (4) the Department's testimony that impoundments lined with single synthetic liners installed in recent years have been mostly successful in preventing ground water pollution; (5) the pre-filed direct testimony of Mr. Mullin

and the hearing testimony of DIGCE's witnesses, Dr. Sweeten, Mr. Mullin, and Mr. Carter regarding the accepted use of clay liners in adjacent states, the advantages of clay liners in dairy operations compared to synthetic liners, and the scientific basis for and success of clay liners in preventing ground water contamination; (6) the lack of evidence that other jurisdictions require double-lined impoundments for dairies and the resulting lack of experience regarding the feasibility of double-lined impoundments in dairy operations; and (7) the testimony that double-lined impoundments would cost about three times the cost of single synthetic-lined impoundments and even more than clay-lined impoundments, and the adverse economic impact of those additional costs on dairy operations. In addition, the engineering specifications proposed by the Department for double-lined impoundments are derived from specifications for solid waste landfills, a very different application than surface impoundments at dairies, and the Department's testimony does not demonstrate that liners meeting these specifications are necessary or appropriate for dairy surface impoundments. The Commission adopts the requirement for a minimum synthetic liner thickness of 40 mil rather than 60 mil based on DIGCE Exhibit 8 and the hearing testimony, particularly TR 1010-1014. Based upon the pre-filed direct testimony of Mr. Mullin, as supplemented by his testimony at the hearing, and based upon the extent of his experience and expertise in designing clay liners for dairy facilities, the Commission accepts the specifications for clay liners proposed in DIGCE Exhibit 8. The Commission also notes the testimony of Ms. Martin on behalf of the Coalition, who would not rule out the use of clay liners for dairies, noting that the choice of liner in her experience is left to professional judgment based on waste characterization. TR 2586-2587. The Commission adopts paragraph (7) as proposed in DIGCE Exhibit 8, with a change to strike the language "regardless of depth to ground water" since the Commission does not adopt any ground water depth provisions. The Commission

adopts paragraph (8) as proposed in the Department's June 3 submittal with the understanding that this section does not apply to impoundments constructed before the effective date of these rules. The Commission adopts paragraph (9) as proposed by the Department in the absence of any comments or objections on this language.

23. The Commission adopts the Operational Requirements for All Dairy Facilities as Section 20.6.2.3220 as follows. The Commission understands that these requirements will constitute permit conditions for dairy facilities under these rules, subject to the applicability of each provision in accordance with its terms, and this section will be redrafted to identify its provisions as permit conditions. The Commission adopts Subsection A as set forth in the Department's June 3, 2010 document, with the changes supported by the Department's testimony at the hearing. The Commission adopts Subsection B as set forth in NMED Rebuttal Attachment 2, with a change to strike the sentence "For the purpose of this subsection, ground water samples obtained from the impoundment monitoring well and the upgradient monitoring well that are used for comparison of water contaminant concentrations shall be collected within two days of each other." This sentence is struck based upon testimony during the hearing that there is no relationship between the two day time difference and the travel time of ground water between an upgradient and downgradient monitoring well. The Commission adopts Subsection C as proposed in NMED Rebuttal Attachment 2 as there were no comments on or objections to this subsection. The Commission adopts Subsections D, E and F as proposed in DIGCE Exhibit 8 for the reasons set forth in DIGCE's comments in its Exhibit 8. The Commission adopts Subsection G as proposed in NMED Rebuttal Attachment 2 in the absence of any comments on or objections to this subsection. The Commission adopts Subsection H as proposed in the Department's June 3, 2010 language submittal for the reasons described in the Department's hearing testimony. The

Commission adopts Subsection I as proposed in NMED Rebuttal Attachment 2, but with deletion of the words “, and to restore the free capacity required by Subsection D of 20.6.2.3217 NMAC” based on the hearing testimony at TR1117-1118. The Commission adopts subsection J as proposed in NMED Rebuttal Attachment 2 in the absence of any comments on or objections to that subsection. The Commission adopts Subsections K, L, M, N, O and P as proposed in DIGCE Exhibit 8 for the reasons identified in that document and based upon the testimony of DIGCE’s witnesses at the hearing, particularly Mr. Mullin and Mr. Carter, regarding the problems with the use of flow meters in a dairy environment, the ability to use alternative devices, such as staff gauges, to satisfy the need for flow and volume measurements, and the resulting need for allowance of alternative flow measurement devices. The Commission adopts Subsection Q as proposed in NMED Rebuttal Attachment 2 in the absence of any comments on or objections to that subsection. The Commission does not adopt Subsection R since that subsection addresses leak detection systems associated with double-lined impoundments, and the Commission is not adopting a requirement for double-lined systems. The Commission adopts Subsections S, T and U as proposed in the Department’s June 3, 2010 submittal based upon the testimony during the hearing. The Commission adopts Subsection V as proposed in the Department’s June 3, 2010 submittal with the following change: strike the second sentence. Based upon the testimony at the hearing, it is not practicable to collect all leachate from silage storages areas, particularly leachate which, despite efforts to minimize its volume, enters the ground. The requirements of the first sentence of this subsection are sufficient to prevent ground water pollution based upon the testimony at the hearing. This change is based in part on the hearing testimony at TR 1122-1124. The Commission adopts Subsection W as proposed in the Department’s June 3, 2010 submittal in the absence of any comments on or objections to this language. The Commission adopts

subsections X and Y as proposed in NMED Rebuttal Attachment 2. The Commission adopts subsection Z and paragraph (1), but not paragraph (2), as proposed in the Department's June 3 submittal based upon the testimony presented during the hearing. The Commission does not adopt paragraph 2 since this paragraph is tied to the need for a more precise depth-to-ground-water determination that is only needed if ground water depth is used to differentiate between different liner design requirements (TR 1125), and the Commission did not adopt liner specification requirements based on ground water depth. The Commission adopts Subsection AA as proposed in NMED Rebuttal Attachment 2 in the absence of any comments or objections to that subsection.

24. The Commission adopts the Additional Operational Requirements for Dairy Facilities with a Land Application Area, Section 20.6.2.3221, as proposed in NMED's June 3, 2010 submittal, with the changes described in this paragraph. Subsection A is adopted as proposed in the June 3 submittal in the absence of any comments or objections. Subsections B and F are adopted with the changes set forth in DIGCE Exhibit 8, which allows for mixing of irrigation water with wastewater in an impoundment prior to land application, provided that at the end of the subsection as proposed by DIGCE, the words "and provided that mechanical agitation shall be used in the impoundment to facilitate blending." This change is based on the hearing testimony, TR 1198-1199. The Commission is not convinced by the Department's testimony that prohibiting blending of wastewater and irrigation water in an impoundment is a necessary measure to prevent ground water pollution and will allow this practice for the reasons stated in DIGCE Exhibit 8 and in the hearing testimony, particularly that of Mr. Mullin and Mr. Carter. The Commission adopts Subsection C as proposed in the Department's June 3 submittal in the absence of comments on objections. The Commission adopts Subsections D and E as proposed in

DIGCE Exhibit 8, which would grandfather dairies that have been permitted to apply wastewater without irrigating. Under the terms proposed by DIGCE, allowing this practice to continue will not result in ground water pollution. The Commission adopts Subsections G, H and I as proposed in the Department's June 3 submittal in the absence of objections or comments. Based on the testimony at the hearing, the Commission understands that DIGCE does not object to flow meters to measure volumes of wastewater discharged to land application areas. The Commission adopts Subsection J as proposed in DIGCE Exhibit 8 for the reasons discussed therein and in the hearing testimony. The Commission adopts Subsection K as proposed in the Department's June 3 submittal with a change to allow the plan to be certified by any one of the professionals listed (CCA, CPAg or; individual certified by the NRCS) based upon the testimony at the hearing. Also, the words "New Mexico" before "Natural Resources Conservation Service" shall be struck for the reasons expressed in the hearing testimony. Subsections L, M and N are adopted as set forth in the Department's June 3 submittal in the absence of objections. Subsection O shall be adopted as proposed in the Department's June 3 proposal except that the second sentence shall be changed by inserting the words "for new dairy facilities" after the words "Backflow prevention" so that that "total disconnect" or "RP" methods are required only for new dairy facilities. This will require existing dairies to employ backflow prevention but will allow them to continue to use existing backflow prevention. This is justified since there was no evidence presented that existing backflow devices are resulting in ground water pollution. TR 1233. The Commission adopts Subsections P and Q as proposed in the Department's June 3 submittal and supported by the testimony at the hearing.

25. The Commission adopts the Additional Requirements for Dairy Facilities Discharging to an Evaporative Wastewater Disposal System” as proposed as Section 20.6.2.3222 in NMED Rebuttal Exhibit 2. No comments or objections were presented on this section.

26. The Commission adopts the Ground Water Monitoring Requirements for All Dairy Facilities, Section 20.6.2.3223, as proposed in NMED Rebuttal Attachment 2 with the following changes. The Commission adopts the changes to Subsection A as proposed in DIGCE Exhibit 8, including the first paragraph, paragraph (1) subparagraph (b), paragraph (2) subparagraph (b), the full sentence added at the end of paragraph (3), paragraph (3) subparagraph (b), paragraph (4) subparagraphs (a), (a)(ii), (b) and (b)(ii), paragraph (5) subparagraph (b), paragraph (6), paragraph (7) subparagraph (c), and the additional paragraph (9) and its three subparagraphs, which should be (a), (b) and (c) instead of (1), (2) and (3). These changes are adopted for the reasons discussed in DIGCE Exhibit 8, the testimony of Dr. Sweeten and Mr. Carter at the hearing, and the public testimony of dairy operators who expressed their concerns with monitoring well requirements. The Commission adopts Subsections B and C as proposed in NMED Rebuttal Attachment 2 in the absence of comments or objections on those subsections. The Commission adopts Subsection D as proposed in the Department’s June 3, 2010 proposal. The Commission adopts Subsection E as proposed in NMED Rebuttal Attachment 2 in the absence of comments or objections. The Commission adopts Subsections F and G with the changes proposed in DIGCE Exhibit 8 for the reasons stated therein. The Commission adopts Subsections G, H, I, J, and K as proposed in NMED Rebuttal Attachment 2 in the absence of comments or objections. The Commission adopts Subsection L with the change set forth in DIGCE Exhibit 8 for the reasons set forth in that Exhibit. The Commission adopts Subsection M

as proposed in the Department's June 3, 2010 submittal for the reasons discussed in the hearing testimony.

27. The Commission adopts the Monitoring Requirements for All Dairy Facilities, Section 20.6.2.3224, as proposed in NMED Rebuttal Attachment 2, with the following changes. The Commission does not adopt the sentence in Subsection B regarding analysis of water for total sulfur since the Commission is not adopting the requirement for that analysis. The Commission adopts the changes to Subsection C as proposed in DIGCE Exhibit 8 for the reasons discussed therein and does not adopt the changes to Subsection C as proposed in the Department's June 3 submittal. The Commission adopts Subsection E as proposed in NMED Rebuttal Attachment 2 in the absence of comments or objections. The Commission does not adopt this subsection as it is not necessary due to the Commission not adopting the double-liner system requirement.

28. The Commission adopts the Additional Monitoring Requirements for Dairy Facilities with a Land Application Area, Section 20.6.2.3225, as proposed in NMED Rebuttal Attachment 2 with the following changes. The Commission adopts the changes the changes to Subsections A, B, C and L as proposed in DIGCE Exhibit 8 for the reasons discussed therein.

29. The Commission adopts the Additional Monitoring Requirements for Dairy Facilities Discharging to an Evaporative Wastewater Disposal System as proposed in NMED Rebuttal Attachment 2 with the changes proposed in DIGCE Exhibit 8 for the reasons discussed therein.

30. The Commission adopts the Contingency Requirements for All Dairy Facilities, Section 20.6.2.3227, as set forth in NMED Rebuttal Attachment 2 with the following changes. Subsections A and B are adopted as set forth in the language submitted by the Department on June 3, 2010, except that the Commission does not adopt the sentences in Subsection A or B reading

“For the purpose of this subsection, ground water samples obtained from the source monitoring well and the upgradient monitoring well that are used for comparison of constituent concentrations shall be collected within two days of each other” based upon the testimony at the hearing that the two day time period does not reflect ground water travel times between upgradient and downgradient monitoring wells. The changes to Subsections A and B as presented in the June 3 Department submittal address DIGCE’s comments on those subsections. The Commission adopts Subsection C as presented in NMED Rebuttal Attachment 2 in the absence of comments or objections to that subsection. The Commission adopts Subsections D, E, F and G as presented in NMED Rebuttal Attachment 2 with the changes in DIGCE Exhibit 8 for the reasons set forth in that Exhibit, except that the last sentences of Subsections D, F and G will be as set forth in NMED Rebuttal Attachment 2 without the change regarding “receipt of notice of” as proposed in DIGCE Exhibit 8. The Commission does not adopt subsection H as this subsection is not need because the Commission has not adopted the proposed rule for double-liner systems. The Commission adopts Subsection I with the change proposed in DIGCE Exhibit 8.

31. The Commission does not adopt Section 20.6.2.3228 as this section is identified as “Reserved” in NMED Rebuttal Attachment 2.

32. The Commission adopts the Additional Contingency Requirements for Dairy Facilities Discharging to an Evaporative Wastewater Disposal System, Section 20.6.2.3229, as proposed in NMED Rebuttal Attachment 2, except that the Commission adopts the change in DIGCE Exhibit 8 to strike the language “or installing an advanced treatment system” for the reasons stated in that Exhibit.

33. The Commission adopts the Closure Requirements for All Dairy Facilities, Section 20.6.2.3230, as proposed in NMED Rebuttal Attachment 2, with the following changes.

In Subsection A, the changes to strike the last sentences of paragraph (1), subparagraph (e) and paragraph (2), subparagraph (b) as proposed in DIGCE Exhibit 8 are accepted for the reasons stated in that Exhibit. Subsections B, C, D and E are adopted as proposed in NMED Rebuttal Attachment 2.

34. The Commission adopts Record Retention Requirements for All Dairy Facilities, Section 20.6.2.3232, as proposed in NMED Rebuttal Attachment 2, in the absence of comments or objections. The rules shall identify the requirements of this section as permit conditions to be included in dairy facility permits.

35. The Commission adopts the Transfer of Dairy Discharge Permits, Section 20.6.2.3234, as proposed in NMED Rebuttal Attachment 2, in the absence of comments on or objections to that section.

36. The Commission adopts Continuing Effect of Prior Actions During Transition, Section 20.6.2.3235, as proposed in NMED Rebuttal Attachment 2.

37. The Commission declines to adopt financial assurance rules and additional rules for closure plans for dairies as proposed in the Coalition testimony, particularly the testimony and exhibits offered by Mr. Shields. The Commission accepts the reasons presented in the rebuttal testimony of Dr. Hagevoort on this topic and also notes that neither Mr. Shields or the Department offered any evidence that the State has incurred any liability for closure of a dairy during the thirty-year plus history of the discharge permit program. Mr. Shields also conceded during his hearing testimony that closure costs for dairies are relatively nominal compared to other facilities for which financial assurance has been required, including mines. With respect to closure planning, the Commission concludes that closure requirements are adequately addressed by the specific closure requirements in the rules as adopted by the Commission.

38. The Commission does not adopt the Coalition's proposal, offered primarily through its witness Ms. Starmer, to require monitoring for additional constituents. The Commission accepts the reasons in opposition to this proposal in the Department's and DIGCE's rebuttal testimony. The Commission in particular notes that the Ground Water Discharge Permit Program is founded upon compliance with ground water quality standards adopted by the Commission, and there are no adopted ground water quality standards for the additional monitoring constituents proposed by the Coalition.

39. The Commission does not adopt the Coalition's proposal, presented primarily through the testimony of Ms. Conn, for a map to be provided as part of the public notice process. The Commission accepts the rebuttal testimony of the Department and DIGCE on this point and notes that public notices identify the location where the public may review copies of the permit application, which includes maps and other information regarding the application. The Commission also notes that the public notice provisions offered from other states in Ms. Conn's testimony were adopted by statute, and the public notices provisions in the Water Quality Act from which the Commission derives its authority do not contain similar requirements, nor did the Legislature specify authority for different public notice requirements for dairies compared to other discharging facilities. The Commission also declines to adopt the additional public notice provisions offered by the Coalition through Ms. Martin for the reasons expressed in the Department's and DIGCE's rebuttal testimony and those expressed above.

40. The Commission does not adopt the changes to the Department's proposed rules recommended by the Coalition's witness Ms. Martin in her direct testimony and accompanying exhibits regarding setbacks and related definitions, permit modification requirements, additional information in permit applications, and the proposed separation distance between ground water

and the bottom of impoundments. The Commission adopts the reasons set forth in the Department's and DIGCE's rebuttal testimony on this point and agrees with the rationale offered by the Department for its proposed setback requirements.

41. The Commission does not adopt the additions to the dairy rule offered by the Coalition through Ms. Martin regarding manure tracking for the reasons set forth in the Department's and DIGCE's rebuttal. This proposal is akin to a waste tracking function and does not appear to be necessary to prevent ground water pollution.

42. The Commission does not adopt the proposal offered by the Commission through Ms. Martin regarding certification of professionals for the reasons set forth in the Department's and DIGCE's rebuttal testimony. Such a function is outside the authority of the Commission and the Department's expertise and is best left to professional licensing agencies.

43. The Commission directs its counsel, in consultation with the Commission of Public Records - State Records Center and Archives to prepare a revised draft of the rules consistent with the substantive provisions adopted by the Commission, consistent with the format of the Commission of Public Records - State Records Center and Archives, which address the following: (1) the portions of the rules that will be required permit conditions shall be specifically identified as such; (2) cross-references to other rule sections shall be reviewed and conformed to any reorganization; (3) redundant language shall be eliminated to make the rule language more succinct, clear and user-friendly; and (4) final renumbering. Counsel may consult with the parties (with notice of any meetings and copies of communications to counsel for all parties) with respect to proposed new rule language.

CONCLUSION

DIGCE appreciates the opportunity to participate in the hearing process and to provide its recommendations for the Commission's adoption of dairy rules. DIGCE greatly appreciates the Commission's dedicated attendance during the hearing, its attention to the testimony, its insightful questions, and the tremendous amount of time and effort the Commission has already devoted, and must devote to these important rules.

Respectfully Submitted,



Anthony (T.J.) V. Trujillo, Esq.
Attorney for DIGCE
Gallagher & Kennedy, P.A.
1233 Paseo de Peralta
Santa Fe, NM 87501
Phone: (505) 982-9523
E-Mail: ajt@gknet.com

&

Dalva Moellenberg, Esq.
Attorney for DIGCE
Gallagher & Kennedy, P.A.
2575 E. Camelback Road
Phoenix, AZ 85016
E-Mail: dln@gknet.com

Certificate of Service:

I hereby certify that a true and accurate copy of the foregoing pleading was served upon the following parties this 23rd day of August, 2010 by electronic mail:

Charles F. Noble
Misty M. Braswell
Office of General Counsel
New Mexico Environment Department
Runnels Building Room N4050
1190 St. Francis Drive
Santa Fe, NM 87505
chuck.noble@state.nm.us
misty.braswell@state.nm.us

Michael Jensen
Amigos Bravos
PO Box 238
Taos, NM 87571
mjensen@amigosbravos.org

Alva Carter, Jr.
DIGCE
214 W. 2nd Street
Portales, NM 88130
alva@yucca.net

Dalva Moellenberg
Gallagher & Kennedy, P.A.
2575 E. Camelback Road
Phoenix, AZ 85016
DLM@gknet.com

Walter Bradley
Dairy Farmers of America
3500 William D. Tate Ave., Suite 100
Grapevine, TX 76051
wbradley@dfamilk.com

Sharon Lombardi
Dairy Producers of New Mexico
PO Box 6299
Roswell, NM 88202
dpm1@juno.com

Jerry Nevins
Caballo Concerned Citizens
PO Box 131
Caballo, NM 87931
jerry@caballonm.com

Dan Lorimier
Sierra Club, Rio Grace Chapter
142 Truman NE
Albuquerque, NM 87108
Daniel.lorimier@sierraclub.org

Kathy Martin
3122 Tall Oaks Circle
Norman, OK 73072
Kjm2@aol.com

Daniele Diamond
3431 West Elm Street
McHenry, Illinois 60050
ddiamond@iccw.org

Jana Hughes
Citizens for Dairy Reform
302 Stiles Road
Hobbs, NM 88242
Hjana48@yahoo.com


Deb Turner
13101 N. Calle Bonita
Hobbs, NM 88242
Turnerdj1980@hotmail.com

Jo Ann King
13100 N. Calle Bonita
Hobbs, NM 88242
Joannking10@leaco.net

Lonny Ashcraft
Ashcraft Consulting, Inc.
PO Box 623
Roswell, NM 88202
loneyashcraft@cableone.net

Bruce Frederick
Jonathan Block
NM Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87505
bfrederick@nmelc.org
jblock@nmelc.org

Jay Lazarus
Glorieta Geoscience, Inc.
PO Box 5727
Santa Fe, NM 87502
lazarus@glorietageo.com


Anthony (T.J.) Trujillo, Esq.